Supreme Court, U. S.
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No. 80-958

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

HOPLAND NOKOMIS ASSOCIATION, et al.,
Petitioners,

vs.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,
Respondents,

and

CYNTHIA DANIELS, et al.,
Respondents.

On Writ of Certiorari
to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Were a group of American Indians denied their right to due process of law and to an effective franchise when their communal property was transferred to the federal government pursuant to a "choice" made by Indian voters at a government-run referendum, when the ballot was couched in legalistic language confusing to lay persons and when that language had an actual legal effect precisely the opposite of that indicated to the Indian voters by the suggestive wording of the ballot?*

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*The Parties are as follows:

Petitioners-Defendants are the Hopland Nokomis Association and its officers and trustees, Leslie Feliz, Esther Lockhart and Theresa Feliz (hereinafter collectively referred to as "Petitioner," "Hopland Nokomis Association" or "Association").

Respondents-Defendants are the occupants of the offices of the Secretary of the Interior, the Secretary of H.E.W., the Commissioner of Indian Affairs, the Sacramento (California) Area Director of the Bureau of Indian Affairs, the Superintendent of the Bureau of Indian Affairs and the Chief of the Phoenix (Arizona) Area Office of the Environment Health of the Public Health Service.

Respondents-Plaintiffs are Cynthia Daniels, Kate Daniels, Mitchell and Frances Jack, Alice Elliott, and Walter Arnold. Angelo Knight, one of the original named plaintiffs, sent a letter to counsel for plaintiffs on April 17, 1978, before Judgment was issued, with a copy to the District Court, asking to be withdrawn as a plaintiff. Excerpt of Record at 202. The record does not indicate action on this request, and it is not clear whether he is still a party.

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OPINIONS BELOW

None of the Opinions, Orders or Judgments below is reported. The Memorandum Opinion of the Court of Appeals for the Ninth Circuit was entered September 12, 1980 and is reproduced below as Appendix A. The Judgment Vesting Title of the United States District Court for the Northern District of California, rendered August 9, 1979 and filed August 13, 1979 is reproduced below as Appendix B. The District Court's Order Amending Judgment of

August 3, 1978, rendered August 9, 1979 and filed August 13, 1979, is reproduced below as Appendix C. The District Court's Order Granting Motion for Court to Convey Title Pursuant to F.R.Civ.P. 70; Order Denying Motions to Re-Open Judgment, to Exclude Charles Scott, George Forman and California Indian Legal Services from Representing Plaintiffs, and For a Continuance, which was rendered August 9, 1979 and filed August 13, 1979, is reproduced below as Appendix D. The District Court's earlier Memorandum of Decision, filed March 29, 1978, and Judgment in this case, entered on August 4, 1978 and not appealed from, are reproduced below as Appendices E and F respectively. The Notice of Appeal on the issues raised by this petition is reproduced as Appendix G.

JURISDICTION

Petitioner seeks review of the decision set forth in the Memorandum opinion of the United States Court of Appeals for the Ninth Circuit, rendered and entered September 12, 1980, affirming the Judgment Vesting Title, entered August 13, 1979, of the United States District Court for the Northern District of California.

Jurisdiction is predicated on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Due Process Clause of the Fifth Amendment to the United States Constitution:

> No person shall . . . be deprived of life, liberty or property without due process of law . . . .

STATEMENT OF THE CASE

On August 3, 1978 the U.S. District Court for the District of Northern California decided that the Indians of the Hopland Rancheria in Hopland, California must vote to decide whether title to their water system, cemetery and related property should remain with the Indian-owned and operated Hopland Nokomis Association or whether title should be vested in the United States. Judgment, Appendix F, App. at 29. The referendum was held on April 22, 1979 by the Bureau of Indian Affairs. Most of the voters "chose" the alternative which would transfer title to the United States.

Petitioners, the Hopland Nokomis Association and its Indian officers refused to sign papers granting title to the United States government, claiming, *inter alia*, that the ballot was confusing, that the Bureau of Indian Affairs had failed to explain the consequences of the vote, and that voters had been misled into voting for precisely the opposite of the result they intended. The United States then asked the District Court to issue an order vesting title in the United States. On August 13, 1979, and over Petitioner's objections, the Court entered judgment vesting title in the United States. Judgment Vesting Title, Appendix A, at A-4-6.

Petitioners took a timely appeal to the Ninth Circuit Court of Appeal which expedited the appeal and affirmed

the judgment on September 12, 1980. Jurisdiction in the District Court was founded on 28 U.S.C. §§ 1331 and 1361. A more complete statement of the case is appended as Appendix I. For purposes of this petition, however, the single issue is whether under all the circumstances, the ballot wording was so misleading and confusing as to render the transfer of Indian owned lands, cemetery and water system to the United States a denial of the franchise and of due process. The relief sought is simply an order that the Bureau of Indian Affairs conduct a new election with appropriate safeguards to insure that the voters know what it is they are voting for.

REASONS FOR GRANTING THE WRIT

A. This Court Should Settle the Question Whether Conveyance of Property to the United States Pursuant to an Election Based on a Confusing and Misleading Ballot Constitutes a Deprivation of Property Without Due Process of Law

If the franchise means anything, it must mean that voters at least be given an understandable ballot which does what it appears to do. Here, the ballot language led voters to a result precisely the opposite of that suggested by the ballot language. The record evidences the confusion that surrounded the ballot—a ballot that denied the Indian voters the effective use of the franchise and their right to due process of law. Certiorari should be granted to decide whether at least minimum standards of clarity and due process are required on ballot measures of this sort and to decide what those standards should be.

We ask each member of the Court to put himself in place of an Indian on the Hopland Rancheria. Assume, for ex-

ample, that it is your desire that the Hopland cemetery and water system should remain under the ownership, supervision and control of the Indian-owned Hopland Nokomis Association. Assume that you want the Bureau of Indian Affairs to have the *least* control over the land, and that you are not familiar with words like "reconveyed" and "real and personal property."

Here is the ballot choice you see on the day of the referendum:

PLEASE READ CAREFULLY BEFORE VOTING VOTE FOR ONE

a) Deeds to all real and personal property which the United States conveyed to the trustees of the Hopland Nokomis Association shall be cancelled and title to said property shall be reconveyed to the United States in trust for the Indians of the Hopland Rancheria; or

b) Title to the real and personal property which the United States conveyed to the trustees of the Hopland Nokomis Association shall remain with the Association, subject to the supervision and control by the United States, through the Bureau of Indian Affairs and/or the Indian Health Service as may be appropriate.

Official Ballot, Appendix H,
App. at A-35

The justices of this Court may have focused on the words of conveyance and have immediately understood that the reference in (b) to "supervision and control" by the B.I.A. gave the B.I.A. *less* real control than outright United States ownership "in trust for the Indians." We submit that the average Indian voter, seeing this choice

for the first time at the polling place, with a line of voters waiting their turn behind him, would in all likelihood have thought that alternative (b), which refers to "supervision and control . . . through the Bureau of Indian Affairs," is the one that provides for more B.I.A. control. Since the reality is precisely the opposite, the voters are likely to have voted for the opposite of that which they might have intended.

Members of the bench and bar encounter so much bad, unnecessarily complex writing that it may be difficult for us to appreciate just how incomprehensible much of it is to nonlawyers. The legal terminology and legalistic phrasing which are bread and butter to us may be gravel and sand in the mouths of laymen, particularly those without a college education.

To the Indian voters of the Hopland Rancheria, the 96-word ballot question was well-nigh incomprehensible. Ballot, Appendix H, App. at A-35.

First, the very length of the choice is a formidable obstacle to many readers. Rudolf Flesch, author of *How to Write Plain English: A Book for Lawyers and Consumers* (1979) has constructed a "readability" index, based on the length of a sentence and the number of syllables in it. Id., end paper. On Flesch's zero to one hundred scale (100 = very easy reading; 0 = very difficult reading), the ballot alternatives score 15, when treated as two sentences. When treated as one sentence, the ballot alternatives are below zero on the readability scale.

More important than length, however, is the fact that the alternatives contain many terms of art that the average

reader either finds meaningless or is likely to misunderstand. An average high school graduate might ask the following questions about the first alternative: What is "real and personal property"? Does "personal" property refer to my individual property? The community's cemetery? The water system? Who are the "trustees" of the Hopland Nokomis Association? Are they government officials of some kind or other, lawyers, bankers or what? What is the property that the ballot says the United States "conveyed" to these trustees? Exactly what does "convey" mean? Did the government give the Association some property (perhaps mine?) after the recent court decision? (Few voters may realize that the original conveyance referred to in the ballot is that which took place thirteen years earlier, when the Rancheria's trust status was terminated.) If the property is now "reconveyed to the United States in trust" for us, do we still control it?

The phrasing of a question affects the response. Two questions essentially identical in content may evoke very different responses, depending on how they are "slanted".

The complex and confusing nature of the ballot question is well-illustrated by a typographical error in the District Court's order mandating the election. The ballot language tracked the terms of the original Judgment precisely, with one exception. In the original Judgment of August 3, 1978, the Court inadvertently omitted a few words from alternative (b), including the only verb in that section. This alternative is literally meaningless without the verb. *See*, ¶ 4(b), Appendix F, App. at A-29 to A-30.

When it was time to prepare the ballot in 1979, B.I.A. officials noticed the omission and filled in the Court's obvious intent. One year later the Court amended the original Judgment, *nunc pro tunc*, to correct the error. Appendix C, App. at A-7.

Nonetheless, it is significant that the typographical error was made by a typist in the first place, that law clerks reviewed and an experienced judge signed the Judgment without catching the error, and that counsel for neither the United States nor the plaintiffs apparently noticed the error when the Judgment was issued. This language is tough going, even for lawyers and judges.

The inherently confusing and misleading character of the ballot was aggravated by the following factors:

1. **The voters who were asked to untangle the legalese of the ballot had never seen the ballot question before they received their actual ballots**

The very first time any voter learned of the wording of the ballot question was when Mr. Norman Sahmaunt, the B.I.A. official who ran the election, read it aloud a few minutes before the voting. Affidavit of Norman Sahmaunt, Ex.R. 153. Then the voters lined up, went in, looked at the ballot and voted. Sahmaunt Aff., Ex.R. at 153.

2. The Bureau of Indian Affairs did not effectively dispel the confusion concerning the subject matter of the election and the meaning of the ballot by its oral explanations given on the day of the election

One member of the Indian community, 75-year-old Ethel Burke, detailed her efforts on election day to gain information from Mr. Sahmaunt.

> I then tried to talk to Mr. Sahmaunt myself. I told him I did not really understand what the vote was about and would like to understand better. I told him I did not understand why everyone from all over, people who did not even live on the Rancheria were allowed to vote. I told him I was concerned about what was going to happen to the cemetery and the church. I told him my husband is there in the cemetery and my stone is there already and I will be buried there someday with my husband and I wanted to know whether the cemetery would go back to the government.
>
> Mr. Sahmaunt would not explain anything to me. He would only say that what happened was up to the people. He said that there had been notices explaining the referendum posted around the Rancheria and that I could have read them. I told him I was partially blind and had been unable to read them.
>
> When I realized that Mr. Sahmaunt would not answer my questions I said out loud, where he could hear, that I had voted all my life and that this was not the way I was used to voting and so I was leaving. I then left. I did not vote.
>
> Affidavit of Ethel Burke, Ex.R. 219-20.

Others remained and voted. But the fact that they may not have articulated their confusion as clearly as Ethel Burke does not mean that they understood any more.

Mr. Sahmaunt, the B.I.A. official who ran the election, does state that he read the ballot aloud and that he then "explained what the results would be if Question A received the majority vote and did the same for Question B. . . . A few questions were asked by the people in attendance and answered by the Bureau of Indian Affairs. The Indian people then stated they understood the propositions in the ballot." Affidavit of Norman Sahmaunt, Ex.R. at 153. Mr. Sahmaunt does not state, however, just what he said to the Indians who were present, how many of the voters were present during his explanation, or how he determined that they understood. He asserts that "The Indian people then stated they understood. . . ," but it is not clear what he means by this. Did they all recite in unison, "We understand"? Did some of them murmur what he took to be approval—or did they merely remain silent when he asked if there were further questions? The record is silent. His explanation, if any, can hardly have been more illuminating than the ballot, particularly in the confused atmosphere at the polling place.

3. The voters who were obliged to try to make sense of this confusing ballot were members of a group traditionally handicapped by inferior schooling

In a somewhat different context, but one also involving voting, this Court has recognized that past acts of discrimination against minority groups have led to significant educational deficits, particularly among the older members

of these groups. *Oregon v. Mitchell*, 400 U.S. 112, 133 (1970). This Court may take judicial notice of the fact that American Indians have, historically, been afforded an inferior, segregated education, at woefully inadequate and inappropriate schools. It follows that they would have even more difficulty than the average reader in understanding the "legalese" thoughtlessly inflicted on them by the B.I.A. in the ballot.

4. There was substantial evidence of confusion about the subject matter of the election even before the voters were confronted with the misleading ballot

Counsel for plaintiffs, California Indian Legal Services, sent an "open letter" to the Indians of the Rancheria noting "we have received several reports that people at the Rancheria may not fully understand what the [Court's] decision means, and what property the election would affect." Letter of George Forman, May 15, 1978, Ex.R. at 200.

Among those confused by the District Court's decision prior to the election was a plaintiff who erroneously thought that the lawsuit might cause some individual Indians' lands to go under government control against their will. Letter of Angelo Knight, April 17, 1978, Ex.R. at 202. A federal official who would be charged with administering the water system also wrote a letter before the election expressing his confusion over the meaning of the Court's decision requiring an election. Mr. Worlund wrote that he felt the options were not viable and that "[i]f we are going to use them there should be some clarification of what happens after the deeds are cancelled." Letter of

John R. Worlund to David Golay, June 22, 1978, Ex.R. at 203. No such clarification was forthcoming.

5. The difficulties that the Indian voters would inevitably have had in understanding the misleading ballot were exacerbated by the fact that there were overtones of violence and drunkenness at the polling place

This was not the most calm and orderly of elections. Unimpeached and uncontradicted affidavits indicate that various individuals openly expressed hostility to the officers of the Hopland Nokomis Association and their families, even voicing threats of physical violence, and that at least one individual appeared to be drunk. Affidavit of Ethel Burke, ¶ 5, Ex.R. at 219; Affidavit of Esther Lockhart, ¶¶ 8-9, Ex.R. at 216-17; Affidavit of Theresa Feliz, ¶ 9, Ex.R. at 208. Such an atmosphere was not conducive to careful and patient consideration of the complex question that the voters saw on the ballot.

All of these factors show that a ballot that was inherently confusing to any non-lawyer was in fact even more confusing in the circumstances of this case.

A ballot need not achieve perfect clarity or objectivity. But where property is to be taken away as a result of a referendum, there must be a certain minimum standard of clarity. The constitutional test should be this: Was the ballot so confusing and misleading that voters who sought one outcome might be led to vote for the opposite outcome?

When the party challenging the vote has been deprived of property due to the vote and is able to demonstrate that the ballot was so confusing as to point the voters in the wrong direction, the burden should shift to the defenders of the voting, to prove that the confusion had no significant effect on the voting. The ballot here did point the voters in the wrong direction, and nothing was effectively done to make clear to them which way to vote to accomplish their goals. The referendum therefore denied Petitioner's property without due process of law.

B. The Writ Should Be Granted to Determine Whether a Voter in a Federally Conducted Election for Other Than Partisan Office Is Entitled to the Same Protection From Confusion and Deception as Would Be Guaranteed by the First and Fourteenth Amendments in a Traditional State or Federal Election

In *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) this Court held that there is "an important state interest . . . in avoiding confusion, deception and even frustration of the democratic process at the general election." And in *Bullock v. Carter*, 405 U.S. 134, 145 (1972), a unanimous Court recognized the state's legitimate interest in regulating the number of candidates on the ballot in order to "avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections." *See also*, *Storer v. Brown*, 415 U.S. 724, 732 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968). These cases balanced the rights of candidates to a place on the ballot against the state's interest in avoiding confusion.

Regardless of the outcome, each recognized the state's interest in avoiding that confusion or even deception.

Here the government has created a confusing and misleading ballot, however inadvertently or in good faith. There is no government interest in presenting a ballot made for lawyers and judges when simple English would suffice. The writ should be granted to determine whether protection from confusion and deception applies in a federal election other than the traditional election for office and to determine what minimal standards should govern Bureau of Indian Affairs and other agency elections.

CONCLUSION

The Writ of Certiorari should issue.

Respectfully submitted,

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(Appendices Follow)

Appendix A

In the United States Court of Appeals
for the Ninth Circuit

No. 79-4649
DC# C-74-1061 WTS

Cynthia Daniels, et al.,
Plaintiffs-Appellees,

vs.

Cecil Andrus, et al.,
Defendants-Appellees,

vs.

Hopland Nokomis Association,
Defendant-Appellant.

[Filed Sept. 12, 1980]

MEMORANDUM

On Appeal from the United States District Court
for the Northern District of California
William T. Sweigert, District Judge, Presiding

[Argued and Submitted August 13, 1980]

Before: WRIGHT, GOODWIN and ALARCON, Circuit Judges.

The Hopland Rancheria, an Indian reservation, was purportedly terminated in 1961 pursuant to the California Rancheria Act. Pub. L. No. 85-671, 72 Stat. 619. That termination was held unlawful because the United States

failed to arrange for an adequate water system as required by § 3(c) of the Act, as amended by Pub. L. No. 88-419, 78 Stat. 390 (1964).

In its decision, the trial court provided that the reservation Indians would decide whether the Hopland Nokomis Association could continue to hold and manage the tribe's community property, including the water system, or whether the property would be returned to federal trust. The Indians voted 52-5 for the trust.

The Association refused to reconvey the land but, after an expedited hearing, the court declared that title was vested in the United States.

The Association appeals from the second proceeding, arguing that its property was taken without due process because: (1) the ballot was confusing; (2) the election was misadministered; and (3) the expedited hearing was improperly granted.

FORM OF THE BALLOT

The wording of the ballot, with one insignificant exception, was set out in the court's original decision. The Association cannot collaterally attack the ballot form. It must try to reopen the original proceeding.

The decision, by its own terms, could be reopened:

> upon motion of any party or upon the court's own motion, if made within one year from the date of entry of judgment or until the people of the Rancheria vote . . . whichever occurs first.

That basis for reopening has expired. The other basis, Rule 60(b), is discretionary. *Rodriguez v. Southern Pacific*

Transportation Co., 587 F.2d 980, 981 (9th Cir. 1978). The trial court did not abuse its discretion when it refused to reconsider the ballot form.

ADMINISTRATION OF THE ELECTION

The Association complains of a few instances of rowdiness at the polling place and of the BIA administrator's refusal to explain or permit explanation of the ballot choices. The BIA certified the election results but the Association did not seek administrative review of that action.

In the expedited hearing, the court found no evidence that the election was improperly conducted. That finding is not clearly erroneous.

EXPEDITED HEARING

The Association argues that an expedited hearing was improperly granted because the only evidence of necessity was hearsay. It did not properly raise this argument below and cites no authority indicating that the court could consider only evidence admissible at trial.

A trial court can adequately evaluate hearsay testimony and make competent procedural rulings based on it.

The hearing was continued two days so the Association could prepare its case. It contends this was inadequate but has not made the required showing of prejudice. *See Sherman v. United States*, 241 F.2d 329, 338 (9th Cir.), *cert. denied*, 354 U.S. 911 (1957) (criminal case). It has never indicated what additional evidence would have been produced had a longer continuance been granted.

AFFIRMED.

Appendix B

In the United States District Court for the
Northern District of California

Civil No. C-74-1061-WTS

Cynthia Daniels, et al.,
Plaintiff,

vs.

Cecil D. Andrus, Secretary of the Interior, et al.,
Defendants.

[Filed Aug. 13, 1979]

JUDGMENT VESTING TITLE
(Rule 70, F.R.Civ.P.)

WHEREAS, on August 4, 1978, judgment was entered in *Cynthia Daniels, et al., v. Cecil D. Andrus, Secretary of the Interior, et al.,* United States District Court, Northern District, California, No. C-74-1061-WTS.

WHEREAS, in paragraph 4 of said judgment, the Court ordered a referendum election be held among the Indian people of the Hopland Rancheria; said election was held on April 22, 1979, and as a result of that election, the majority voted to cancel and reconvey to the United States in trust for the Indians of the Hopland Rancheria all real and personal property presently held by the Nokomis Association:

IT IS ORDERED, ADJUDGED AND DECREED:

That all right, title and interest of Hopland Nokomis Association in and to certain parcels of land, more par-

ticularly described below, located within the exterior boundaries of Hopland Rancheria, County of Mendocino, State of California are divested; and all right, title and interest in these parcels of land are hereby vested in the United States of America in trust for the Indians of Hopland Rancheria, described as follows:

Parcel Fifty-nine (59) as shown upon the Record of Survey, Hopland Rancheria, recorded May 26, 1964 in Case 2 of Maps, Drawer 3, Page 14, in the Office of the Recorder of the County of Mendocino, State of California.

Parcel Sixty-Six (66) as shown upon the Record of Survey, Hopland Rancheria, recorded May 26, 1964 in Case 2 of Maps, Drawer 3, Page 14 in the Office of the Recorder of the County of Mendocino, State of California.

Parcel Sixty-seven (67), Parcel Seventy-seven (77), Parcel Eighty-one (81), Parcel Eighty-two (82), (Parcel Eighty-three (83), Parcel Eighty-four (84), Parcel Eighty-five (85), Parcel Eighty-eight (88), Parcel Eighty-nine (89), all 6-foot-wide domestic water pipeline easements as shown on Record of Survey, Hopland Rancheria, recorded May 26, 1964 in Case 2 of Maps, Drawer 3, Page 14, in the Office of the Recorder of the County of Mendocino, State of California, and as shown on the Revised Record of Survey, Hopland Rancheria, recorded February 24, 1965 in Case 2 of Maps, Drawer 4, Page 3, in the Office of the Recorder of the County of Mendocino, State of California, and also as shown on Revised Record of Survey, Hopland Rancheria, recorded November 2, 1966 in Case 2 of Maps, Drawer 6, Page 41, in the Office of the Recorder of the County of Mendocino, State of California; and

a 10-foot-wide domestic water pipeline and a 40-foot-wide access road easement as shown on Record of Survey, Hopland Rancheria, recorded May 26, 1964 in Case 2 of Maps, Drawer 3, Page 14, in the Office of the Recorded of the County of Mendocino, State of California.

Dated: Aug. 9th 1979

/s/ W. T. SWEIGERT
Senior United States District Judge

Appendix C

United States District Court
Northern District of California

C-74-1061WTS

Cynthia Daniels, et al.,
Plaintiffs,

vs.

Cecil Andrus, Secretary of the Interior, et al.,
Defendants.

[Filed Aug. 13, 1979]

ORDER AMENDING JUGMENT
OF AUGUST 3, 1978

In this court's Judgment of August 3, 1978, the words "shall remain with the Association" were inadvertently omitted from page 3, line 4, between the words "Hopland Nokomis Association" and the phrase "subject to the supervision of and control by the United States."

For this reason, the court has required and received an evidentiary showing (i.e., the Affidavit of Charles Scott, filed August 1, 1979) to the effect that no one voting at the referendum was misled by this omission.

The court finds that, notwithstanding the omission, the notices to the Indians of the Hopland Rancheria (see Ex. A and B of the Affidavit), and the ballot itself (see Ex. D to Sahmaunt Affidavit, filed August 2, 1979), did in fact

notify them in terms which contained the language omitted from the Judgment, and that the voting Indians knew prior to and during the referendum that the alternatives were as follows:

> (a) Deeds to all real and personal property which the United States conveyed to the trustees of the Hopland Nokomis Association shall be cancelled and title to said property shall be reconveyed to the United States in trust for the Indians of the Hopland Rancheria; *or*
>
> (b) Title to the real and personal property which the United States conveyed to the trustees of the Hopland Nokomis Association shall remain with the Association, subject to the supervision and control by the United States, through the Bureau of Indian Affairs and/or the Indian Health Service as may be appropriate.

In order to more clearly express the intent of the court and to conform to the facts now found, the court hereby amends the Judgment of August 3, 1978, *nunc pro tunc,* at page 3, lines 1 through 7, to read as follows:

> (b) Title to the real and personal property which the United States conveyed to the trustees of the Hopland Nokomis Association shall remain with the Association, subject to the supervision and control by the United States, through the Bureau of Indian Affairs and/or the Indian Health Service as may be appropriate.

SO ORDERED.

Dated: August 9th, 1979

/s/ W. T. SWEIGERT
W. T. Sweigert

Appendix D

United States District Court
Northern District of California

C-74-1061 WTS

Cynthia Daniels, et al.,
Plaintiffs,

vs.

Cecil Andrus, Secretary of the Interior, et al.,
Defendants.

[Filed August 13, 1979]

ORDER GRANTING MOTION FOR COURT TO CONVEY TITLE PURSUANT TO F.R. CIV. P. 70; ORDER DENYING MOTIONS TO REOPEN JUDGMENT, TO EXCLUDE CHARLES SCOTT, GEORGE FORMAN, AND CALIFORNIA INDIAN LEGAL SERVICES FROM REPRESENTING PLANTIFFS, AND FOR A CONTINUANCE.

On July 31, 1979 and August 2, 1979, the court heard arguments and reviewed the evidentiary record with counsel in connection with the following motions:

1) Defendant United States' motion for an order directing the Hopland Nokomis Association, by its appropriate officers, to execute a deed conveying title to the community water system at the Hopland Rancheria to the United

States in trust for the Indians of the Hopland Rancheria, or in the alternative, for an order executed by the court effecting such conveyance pursuant to F.R.Civ.P. 70.

2) Defendant Hopland Nokomis Association's motions to reopen judgment; to exclude plaintiffs' attorneys Charles Scott, George Forman, and the California Legal Services from further participation as attorney of record; and for a continuance of the motion made by the United States.

It appearing to the court from the Affidavit of David Golay, filed July 25, 1979, that the recent severe drought combined with the cessation of operation of the water system by the Hopland Nokomis Association has resulted in a serious lack of water at the Rancheria; and it further appearing from said uncontroverted affidavit that the water shortage can be alleviated only when the United States holds legal title to the water system, in accordance with this court's judgment of August 3, 1978, the court hereby grants the motion of the United States for an order conveying title pursuant to F.R.Civ.P. 70. A separate judgment will be filed and entered accordingly.

Upon reviewing the entire evidentiary record submitted in connection with the pending motions, the court is convinced that there is no significant evidence to support the contentions of the Hopland Nokomis Association to the effect that 1) the typographical omission in the court's Judgment of August 3, 1978 caused any confusion among the voters; 2) ineligible persons voted at the referendum; 3) eligible voters were not apprised of the consequences of

the vote; and 4) some voters were intimidated due to the conduct of some persons who were allegedly drunk and threatening.

Furthermore, the court finds no merit in the contention that the California Supreme Court's decision in *Comden v. Superior Court,* 20 Cal.3d 906 (1978) requires that this court disqualify plaintiffs' counsel from participation herein.

Wherefore, the motions of the Hopland Nokomis Association are hereby denied.

Due to the seriousness of the present water shortage at the Hopland Rancheria and the apparent need to act expeditiously, the court is filing this order without a complete and detailed explanation of the reasons therefore. However, a more complete Memorandum of Decision will be filed subsequently.

SO ORDERED.

Dated: August 9th, 1979.

/s/ W. T. SWEIGERT
W. T. Sweigert

Appendix E

United States District Court
Northern District of California

Roger Smith, as Administrator of the Estate of Ellerick Smith, et al., Plaintiff, vs. United States of America, et al., Defendants.	No. C 74 1016 WTS.
Cynthia Daniels, et al., Plaintiffs, vs. Cecil D. Andrus, Secretary of the Interior, et al., Defendants.	No. C 74 1061 WTS.

[Filed March 29, 1978]
Sweigert, District Judge

MEMORANDUM OF DECISION

These two related actions, involving as the primary issue the question whether the United States government unlawfully terminated the Hopland Rancheria (the "Rancheria") located in Mendocino County, California, have been brought by Indian people of the Rancheria and are presently before the court on plaintiffs' motion for partial summary judgment.

I. THE RECORD AND THE SUMMARY JUDGMENT MOTIONS

After extensive discovery and numerous status and pretrial conferences with the court, these related actions were to be submitted to the court for decision upon an agreed statement of facts. The federal defendants and the plaintiff in both actions signed and filed the agreed statement of facts (*Smith*, Docket No. 27; *Daniels*, Docket No. 63). The Association defendants in *Daniels*, presently the holders of legal title to the water system lands on the Rancheria, then represented by counsel (but now appearing *in propria persona*), refused to sign the agreed statement, or to state in what manner or to what portion of the agreed statement they could not agree (*Daniels*, Docket No. 69 Ex. 2).

In light of this problem this court vacated the intended submission of these actions. Plaintiffs then filed the pending motions for partial summary judgment, contending that there is no genuine issue of material fact on any issue in either case (except the amount of damages in *Smith*) and seeking all the declaratory and injunctive relief requested in the *Smith* and *Daniels* complaints.

An extensive evidentiary record has been compiled in support of the motions (*Smith*, Docket Nos. 33, 34; *Daniels*, Docket Nos. 78, 79).

The federal defendants in both actions have filed a response which is in substantial agreement with the plaintiffs—agreeing that the Rancheria was wrongfully terminated, that the trust obligations of the United States to

the Indian people of the Rancheria still exists, and that the Indian distributees of Rancheria lands should be permitted to reconvey their lands to the United States if they have not already reconveyed their lands to good-faith, non-Indian purchasers.

The Mendocino County defendants in *Smith* have filed no opposition nor any statement of non-opposition to the pending motion in *Smith*.

The Association defendants in *Daniels* have filed an opposition to the plaintiffs' motion, including certain evidentiary materials (*Daniels*, Docket Nos. 72, 76).

II. THE CALIFORNIA RANCHERIA ACT

For many years there were throughout California numerous small Indian communities called rancherias, with title of the lands of these communities vested in the United States in trust for the resident Indians. Since the lands were held in trust, they could not be taxed by state or local authorities, *see*, *McCurdy v. United States*, 264 U.S. 484 (1924), and the resident Indians had no power to convey title of the lands to others. The United States controlled the rancheria lands under the special fiduciary duty owed by the United States to the Indian people.

In 1958, Congress enacted the California Rancheria Act [P.L. 85-671, 72 Stat. 619], amended in 1964 [P.L. 88-419, 78 Stat. 390], which facilitated the termination of the trust relationship between the United States and the Indian people on forty-one enumerated rancherias and reserva-

tions in California.[1] The Act provides a procedure for the termination of these rancherias and reservations and distribution of assets, including property, to eligible Indians in fee simple.

The preparation of a plan for termination of the Hopland Rancheria is mandatory. *See*, Sections 1 and 2(a) of the Act. However, such a termination plan does not become effective until approved by a majority of adult Indians who would participate in the distribution. *See*, Section 2(b) of the Act. Congress contemplated that such a termination plan be completed and the lands distributed not more than three years after it is approved. *See*, Section 2(b) of the Act. Thus, under the Act, actual termination of the rancheria is *permissive*, not mandatory, being dependent upon approval by a majority of the Indians who would participate in the distribution. *Duncan v. Andrus*, C-71-1572 WWS (N.D.Cal., March 22, 1977).[2]

Under Section 3(c) of the Act (as amended) the Secretary of the Interior and the Secretary of Health, Education, and Welfare (H.E.W.) were given certain duties pertaining to installation of sanitation and irrigation facilities:

> "Sec. 3. Before making the conveyances authorized by this Act on any rancheria or reservation, the Secretary of the Interior is directed:

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[1]Among the enumerated rancherias was the Hopland Rancheria. In 1964 the Act was amended to include all rancherias and reservations lying wholly in California.

[2]In *Duncan* the primary issue was whether the United States government unlawfully terminated the Robinson Rancheria in Lake County, California.

* * * *

(c) To construct, improve, install, extend, or otherwise provide, by contract or otherwise sanitation facilities (including domestic and community water supplies and facilities, drainage, facilities, and sewage—and waste disposal facilities together with necessary appurtenances and fixtures) and irrigation facilities for Indian homes, communities, and lands as he [the Secretary] and the Indians agree, within a a reasonable time, should be completed by the United States: *Provided* That with respect to sanitation facilities, as hereinabove described, the functions specified in this paragraph, including agreements with Indians with respect to such facilities, shall be performed by the Secretary of Health, Education and Welfare in accordance with the provisions [of 42 USC § 2004a]".[3]

The federal defendants in both *Smith* and *Daniels* now concede that the Hopland Rancheria was not lawfully terminated because neither the Secretary of the Interior nor the Secretary of H.E.W. fulfilled their duties under Section 3(c) of the Act by negotiating an agreement concerning improvement of sanitation and irrigation facilities.[4]

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[3]42 USC § 2004a provides certain authority to the Secretary of H.E.W. in regard to providing sanitation facilities and services.

[4]The approved termination plan for the Rancheria did provide that the *Bureau of Indian Affairs* would provide water service to any existing home not then served or to any home under construction that was as much as 50% completed within 90 days after approval of the termination plan, provided such service could be accomplished within the limitations of the present water system or further expansion from known available water sources and such cost would not be excessive.

However, the amended Section 3(c) requires the *Secretary of the Interior* to enter into an agreement concerning construction

III. TERMINATION OF THE HOPLAND RANCHERIA

The Commissioner of Indian Affairs finally approved the termination plan for the Rancheria on May 22, 1961. The termination plan was approved by the eligible Indians of the Rancheria on June 18, 1961.

Before any actual distribution of lands to the eligible Indians, Section 3(c) of the Act was amended, requiring the Secretary of the Interior and the Secretary of H.E.W. to reach agreements with the Indian people of the Rancheria on improvements to sanitation and irrigation facilities, as specified above. No such agreement was ever negotiated for the Rancheria. Actual delivery of deeds of Rancheria lands to eligible Indians did not begin until December 15, 1966, and continued up until July, 1967.

IV. THE SMITH ACTION

A. *The Allegations of the Complaint*

In *Smith* the plaintiff[5] has brought an action for damages and declaratory and injunctive relief against six defendants[6] alleging that the Rancheria was unlawfully terminated in that the United States failed to install adequate domestic and agricultural water systems on the

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of irrigation facilities and the *Secretary of H.E.W.* to enter into an agreement concerning construction of sanitation facilities. No such agreements have been negotiated.

[5]Plaintiff Ellerick Smith had died since the complaint was filed. The administrator of his estate, Roger Smith, has been substituted as plaintiff (*Smith*, Docket No. 12).

[6]The defendants are the United States, the Secretary of the Interior, the Secretary of H.E.W., the Commissioner of Indian Affairs (collectively the "federal defendants") and the Tax Assessor and Tax Collector of the County of Mendocino, California.

Rancheria, under agreements to be negotiated with the Indian people of the Rancheria, prior to the alleged termination of the Rancheria and distribution of Rancheria lands to eligible Indians, including plaintiff.

Smith's first claim, brought under 28 USC § 1346(a)-(2) against the federal defendants only, is for damages resulting from the United States' unlawful termination of the Rancheria and the subsequent invalid distribution of Rancheria lands to plaintiff. Plaintiff contends that after distribution of certain Rancheria lands to him, he was unable to pay his property taxes on two of his parcels which were eventually sold at a tax sale—to plaintiff's damage in the sum of $8,000. Plaintiff also contends that he has incurred tax liabilities of $1,000 on two remaining parcels of land.

Smith's second claim, brought under 28 USC § 1331 and § 1361[7] against only the Secretary of the Interior and the Commissioner of Indian Affairs, seeks declaratory and injunctive relief. Plaintiff seeks a declaration that (1) the Rancheria was unlawfully terminated and is not now in fact terminated, (2) the United States still owes a trust obligation to the Indian people of the Rancheria, (3) the conveyance of Rancheria lands to plaintiff was unlawful and that such conveyance is voidable at plaintiff's option, and (4) the plaintiff's remaining parcels are not subject to taxation by state or local authorities until the Rancheria is unlaw-

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[7]Plaintiff also claims jurisdiction under the Administrative Procedure Act (5 USC § 701 *et seq.*) However, that Act is not an independent grant of jurisdiction to federal courts. *Sampson v. Califano*, 430 U.S. 99 (1977).

fully terminated. Plaintiff also seeks an injunction requiring the Secretary of the Interior and the Commission of Indian Affairs to pay plaintiff's property taxes on his remaining parcels until the Rancheria is lawfully terminated.

Plaintiff's third claim, brought under 28 USC § 1331 and § 1343 and 42 USC § 1983 against only the Tax Assessor and Tax Collector of Mendocino County, seeks injunctive relief restraining future assessments or collections, levies, seizures, or sales of plaintiff's remaining parcels to pay present or future taxes until such time as the Rancheria is lawfully terminated.

B. *Summary Judgment*

The federal defendants concede that the Rancheria was unlawfully terminated and should not be treated as terminated, that the United States still owes a trust obligation to the Indian people of the Rancheria, and that plaintiff Smith should be given the opportunity to reconvey his remaining parcels received during the distribution back to the United States—provided he has not already conveyed those parcels to good-faith non-Indian purchasers.[8]

This court has jurisdiction over the damage claim under 28 USC § 1346(a)(2), over the declaratory and injunctive relief claim as against the federal defendants under 28 USC § 1331 and § 1361, and over the Mendocino County

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[8]Good-faith non-Indian purchasers are not, under Rule 19, F.R.Civ.P., indispensable parties to these actions since any relief granted to plaintiff in this action will be tailored to avoid affecting the property interests of such third persons, who have not been named as defendants in this action.

defendants under 28 USC § 1331 and § 1343.[9] *See, Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974); *Duncan v. Andrus,* C 71 1572 WWS (N.D.Cal., March 22, 1977).

In light of the concessions made by the federal defendants, and upon this court's review of the undisputed facts, it is clear that the Rancheria was not lawfully terminated and should not be treated as terminated, and that the conveyance of certain Rancheria lands to plaintiff was unlawful since the Rancheria was unlawfully terminated.

It is clear, and undisputed, that the United States did not herein fulfill its fiduciary duties to the Indian people of the Rancheria, duties that must be exercised with "great care," *United States v. Mason,* 412 U.S. 391, 398 (1973), in accordance with "moral obligations of the highest responsibility and trust," that must be measured "by the most exacting fiduciary standards." *Seminole Nation v. United States,* 316 U.S. 286, 297 (1942).

Since the United States, acting in its capacity as trustee for the Indian people of the Rancheria, did not meet this fiduciary standard, it may be held liable to the Indians for lost or destroyed trust properties, or diminution in their value. *See, United States v. Mason, supra; Manchester Band of Pomo Indians, Inc. v. United States,* 363 F.Supp. 1238 (N.D. Cal. 1973) (holding United States liable in damages for failure to properly manage Indian trust funds). Normally such damages woud be payable to the tribe or

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[9]The defendants have not contended that this court is without jurisdiction to hear this action. (*See, Smith* Docket Nos. 18, 20).

band of Indians. *See, Manchester Band of Pomo Indians, Inc. v. United States, supra.* However, since plaintiff Smith has individually suffered the loss by tax sale of two parcels distributed to him any such liability of the United States should run directly to the plaintiff, for, upon approval of the Rancheria termination plan on June 18, 1961, by a majority of eligible Indians, plaintiff received a vested beneficial interest in the lands distributed to him, although he did not receive, at that time, the right to convey that property or subject it to encumbrance. 25 C.F.R. § 242.7 (1960), *now* 25 C.F.R. § 242.9 (1977).

Accordingly, plaintiff Smith is entitled to recover damages for the loss by forced tax sale of two parcels of Rancheria land distributed to him. The hearing of evidence on this damages claim will be promptly referred to a Magistrate acting as a Special Master under Rule 53, F.R.Civ.P.

Furthermore, it is clear from the language of the California Rancheria Act that the lands of a rancheria covered by the Act are not subject to federal, state, or local taxation until the rancheria is lawfully terminated in accordance with the provisions of the Act and the lands distributed to eligible Indians.

Section 2(d) of the Act provides:

> "No property distributed under the provisions of this Act shall at the time of distribution be subject to any Federal or State income tax. Following any distribution of property *made under the provisions of this Act*, such property and any income derived therefrom by the distributee shall be subject to the same taxes,

State and Federal, as in the case of non-Indians . . . ." (emphasis added)

Section 10(b) of the Act, as amended, provides:

"After the assets of a rancheria . . . have been distributed *pursuant to this Act*, the Indians who receive any part of such assets, and dependent members of their immediate families who are not members of any other tribe or band of Indians, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, [and] *all restrictions and tax exemptions applicable to trust or restricted land or interests therein owned by them are terminated. . . .*" (emphasis added)

Since these sections of the Act evidence Congressional intent to hold rancheria lands in trust for the Indian people of the rancherias, as in fact was done, and to continue the lands in such trust status until all requirements for termination under the Act are met and the lands actually distributed, the plaintiff's lands herein did not become subject to taxation. *See, McCurdy v. United States*, 264 U.S. 484 (1924).

Furthermore, plaintiff Smith shall be entitled to elect whether (1) to reconvey legal title to his remaining parcels, received during the distribution, back to the United States, to be held in trust as specified in the instrument of conveyance, provided he has not already conveyed those parcels to good-faith, non-Indian purchasers, or (2) to retain legal title to his remaining parcels received during the distribution. Such election must be made within thirty days of the filing date of this Memorandum of Decision

by plaintiff Smith filing a statement of election in this action. Any failure of plaintiff Smith timely to make such an election will be deemed a decision to retain legal title to his remaining parcels.

If plaintiff Smith elects to reconvey legal title to his remaining parcels back to the United States, to be held in trust for him, such parcels will not be subject to federal or state taxation unless and until the Rancheria is lawfully terminated and legal title to the parcels is again conveyed to plaintiff. However, if plaintiff Smith elects to retain legal title to his remaining parcels, or fails timely to make such an election, such parcels will become subject to federal and state taxation on the date such election is made, or if none is timely made, thirty (30) days from the filing date of this Memorandum of Decision.

In view of the foregoing declaratory relief to be granted, and especially in view of the election left to plaintiff, any injunctive relief, as to the Mendocino County defendants, would be premature.

V. THE DANIELS ACTION

A. *Allegations of the Complaint*

In *Daniels*, the plaintiffs[10] have brought an action for declaratory and injunctive relief against ten defendants[11] based on jurisdiction under 28 USC § 1331 and § 1361.

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[10]The plaintiffs are Cynthia Daniels, Kate Daniels, Mitchell and Frances Jack, Angelo Knight, Alice Elliott, and Walter Arnold, all distributees or heirs of distributees under the termination plan.

[11]The defendants are the Secretary of the Interior, the Secretary of H.E.W., the Commissioner of Indian Affairs, the Sacramento (California) Area Director of the Bureau of Indian Affairs, the

Plaintiffs' first claim alleges that the federal defendants unlawfully terminated the Rancheria by not first providing adequate sanitation and irrigation systems on Rancheria lands, under agreements to be negotiated with the Indian people of the Rancheria, that the federal defendants unlawfully conveyed the water system lands[12] to the Association, and that the Association defendants have unlawfully excluded certain plaintiffs from Association membership and unlawfully denied or threatened to deny water service to plaintiffs.[13]

Plaintiffs, under the first claim, seek a declaration (1) that the Rancheria was not lawfully terminated and is not terminated, (2) that the United States still owes a trust obligation to the Indian people of the Rancheria, (3) that the Rancheria water system lands were unlawfully conveyed to the Association, and (4) that the United States still owes a trust obligation to the Indian people

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Superintendent of the Bureau of Indian Affairs, the Chief of the Phoenix (Arizona) Area Office of the Environment Health of the Public Health Service (collectively "the federal defendants"), and the Hopland Nokomis Association (the present water company on the Rancheria) and its officers and trustees, Leslie Feliz, Esther Lockhart, and Theresa Feliz (collectively "the Association defendants"). The eleventh defendant, the Superior Court for the State of California, County of Mendocino, has been dismissed without prejudice (*Daniels*, Docket No. 44).

[12]The Association also received other lands of the Rancheria as part of the distribution. However, none of those conveyances are in dispute in this action.

[13]On June 12, 1974, this court granted a preliminary injunction enjoining the Association defendants from terminating or otherwise interfering with water service to the plaintiffs and ordering the Association defendants to restore water service to plaintiff Kate Daniels (*Daniels*, Docket No. 13).

of the Rancheria to supervise and control the management of the Rancheria water system, prevent unlawful termination or interruption of water service, and to supervise the affairs of the Association, or, if necessary, actually run the water system on the Rancheria.

Plaintiffs' second claim seeks cancellation of the allegedly unlawful deeds of title to Rancheria water system lands now held by the Association defendants and conveyed to them during the distribution of Rancheria lands.

Plaintiffs' third, fourth, and sixth claims are directed solely to Association activities—i.e., allegations of illegality in certain Association actions in terminating or interrupting water service, making special assessments, in conducting elections, and in making decisions as to Association membership.

VI. SUMMARY JUDGMENT

The federal defendants again concede that the Rancheria was unlawfully terminated and should not be treated as terminated, and that the United States still owes a trust obligation to the Indian people of the Rancheria.

This court has jurisdiction over the declaratory and injunctive relief claims under 28 USC § 1331 and § 1361. *See, Oneida Indian Nation v. County of Oneida, supra*; *Duncan v. Andrus, supra.*

The Association defendants oppose the motion, contending that the Rancheria was lawfully terminated. However, the evidentiary materials submitted by the Association defendants do not raise any genuine dispute over the mate-

rial facts concerning termination of the Rancheria—only broad general conclusions unsupported by specific factual allegations are presented. The Association, as the party opposing the motion for summary judgment, has failed to present specific facts showing a genuine dispute over the material facts on the issue of termination. Accordingly, since the plaintiffs have sustained their initial burden of showing no genuine issue of material fact, the plaintiffs' motion for partial summary judgment on the issue of termination is hereby granted.

Since the Rancheria has not been lawfully terminated, and should not be treated as terminated, the United States still owes a fiduciary obligation to the Indian people of the Rancheria, including the duty to supervise and control the management of the Rancheria water system.

However, recognition of a continuing fiduciary obligation on the part of the United States to the Indian people of the Rancheria, based upon the conclusion that the Rancheria was not lawfully terminated, does not necessarily require, as plaintiffs urge, cancellation of the conveyance of Rancheria water system lands to the Association. Any such cancellation should be left to the election of the Indian people of the Rancheria. *See, Duncan v. Andrus, supra.*

Accordingly, the United States, acting as trustee, is hereby directed to promptly arrange a referendum at which the Indian people of the Rancheria may elect either to (1) cancel the deeds of water system lands to the Association, or (2) permit legal title to the water system lands

to remain with the Association, under the supervision and control of the United States.

In view of the relief granted above, it is unnecessary for the court to reach the other claims raised by plaintiffs, directed to actions of the Association, for these issues are best left, in the first instance, to the United States acting in its fiduciary role.

CONCLUSION

For the foregoing reasons the plaintiffs' motion for summary judgment is granted, with relief being granted as specified above.

Dated: March 28, 1978.

/s/ W. T. SWEIGERT
United States District Judge

Appendix F

United States District Court
Northern District of California

No. C 74 1061 WTS

Cynthia Daniels, et al.,
Plaintiffs,

vs.

Cecil D. Andrus, Secretary of the Interior, et al.,
Defendants.

[Filed August 3, 1978]

JUDGMENT
(Rule 58, Fed.R.Civ.P.)

The Court heretofore having issued its Memorandum of Decision, which memorandum shall be deemed to constitute findings of fact and conclusions of law pursuant to F.R.C.P. Rule 52(a), and having heard from and considered the views of the parties hereto concerning said memorandum,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Because the United States failed to fulfill its obligations under § 3(c) of the California Rancheria Act (Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, P.L. 88-419, 78 Stat. 390) to provide to the distributees of the assets of the Hopland Rancheria water supply and delivery systems adequate to

satisfy the reasonable needs of such distributees, and because the United States failed to fulfill its fiduciary duties to the Indian people of the Hopland Rancheria in approving and implementing the plan for the distribution of the assets of the Hopland Rancheria under the Rancheria Act, neither the trust status of the lands of the Hopland Nokomis Association, nor the Indian status of the people of the Hopland Rancheria have been lawfully terminated;

2. The fiduciary duty owed to the Indians of the Hopland Rancheria by the United States has not been terminated. The United States still owes a fiduciary duty to the Indian people of the Hopland Rancheria.

3. The conveyance by the United States of lands and assets of the Hopland Rancheria to the trustees of the Hopland Nokomis Association, having occurred in the absence of fulfillment by the United States of its obligations under § 3(c) of the Rancheria Act and in breach of its fiduciary duties to the Indian people of the Hopland Rancheria, was unlawful, and said conveyance is voidable at the option of the Indian people of the Hopland Rancheria, pursuant to the procedure set forth in Paragraph 4 hereof;

4. The Bureau of Indian Affairs is directed to conduct among the Indian people of the Hopland Rancheria, as soon as practicable, a referendum at which said Indians shall be presented with the following two choices:

a. Deeds to all real and personal property which the United States conveyed to the Trustees of the Hopland Nokomis Association shall be cancelled, and title to said property shall be reconveyed to the United

States in trust for the Indians of the Hopland Rancheria; or

b. Title to the real and personal property which the United States conveyed to the Trustees of the Hopland Nokomis Association, subject to the supervision and control by the United States, through the Bureau of Indian Affairs and/or the Indian Health Service, as may be appropriate;

5. The following Indian persons shall be entitled to participate in the above-described referendum:

a. Any person who, at the time of the distribution of the assets of the Hopland Rancheria, was deemed entitled to share in said distribution (i.e., any person named as a distributee in the final distribution plan);

b. Any heir and/or Indian legatee of a distributee, over 18 years of age;

c. Any person listed in the final distribution plan as a dependent of a distributee who, but for minority at the time, would have been entitled to be named as a distributee.

6. Because the real and personal property which the United States conveyed to the Trustees of the Hopland Nokomis Association was intended to be held and managed by said Trustees and said Association for the benefit of all of the Indians entitled to share in the distribution of the assets of the Hopland Rancheria, and their heirs, legatees and dependents, the Hopland Nokomis Association and the Trustees thereof are permanently enjoined from terminating and/or refusing to provide water service to any occupied structure on the Rancheria which is, or which has been connected to the Hopland Nokomis Association's water sys-

tem, and from refusing to extend water service to any structure not previously connected to said system, but which is located on Indian-owned land within the Rancheria and is intended for human use or habitation, except under fair, reasonable and uniform criteria, circumstances and conditions, including, but not limited to, an unjustified failure to pay the duly-adopted monthly water service charge or unjustified failure to pay any special assessment hereinafter duly enacted for the purpose of defraying the costs of required repairs or reasonably prudent capital improvements;

7. If the Indians of the Hopland Rancheria vote to return the real and personal property of the Hopland Nokomis Association to trust status, the Trustees of the Hopland Nokomis Association shall immediately execute deeds and/or other appropriate instruments, the forms of which shall be provided by the Bureau of Indian Affairs, reconveying said real and personal property to the United States of America, to be held in trust for the Indians of the Hopland Rancheria. Upon execution of said deeds or instruments, the United States shall cause same to be recorded in the official records of the County of Mendocino;

8. The Hopland Nokomis Association, through its Trustees, shall file with the court quarterly reports setting forth the Association's revenues, expenses and condition;

9. The court reserves the power to reopen this action upon motion of any party or upon the court's own motion, if made within one year from the date of entry of judg-

ment, or until the people of the Rancheria vote to return the real and personal property of the Association to trust status, whichever occurs sooner.

Dated: August 3, 1978.

/s/ W. T. SWEIGERT
United States District Judge

Appendix G

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United States District Court
Northern District of California

No. C-74-1061 WTS

Cynthia Daniels, et al.,
Plaintiffs,

vs.

Cecil D. Andrus, Secretary of Interior, et al.,
Defendants.

[Filed Sept. 20, 1979]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Hopland Nokomis Association, and Leslie Feliz, Esther Lockhart, and Theresa Feliz, as officers and trustees of said Association, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order granting motion for Court to convey title pursuant to F.R.Civ.P. 70, the order denying motions to reopen judgment, to exclude Charles Scott, George Forman, and

California Indian Legal Services from representing plaintiffs, and for a continuance, and, from the judgment vesting title, all entered in this action on the 9th day of August, 1979.

Dated: September 11, 1979

JOSEPH REMCHO
THELTON E. HENDERSON
ROSEN, REMCHO
& HENDERSON

/s/ By: JOSEPH REMCHO
Joseph Remcho

Appendix H

HOPLAND RANCHERIA REFERENDUM ELECTION

HOPLAND, CALIFORNIA APRIL 22, 1979

OFFICIAL BALLOT

On August 3, 1978, the United States District Court, Northern District of California, entered judgment in Cynthia Daniels, et al., v. Cecil D. Andrus, Secretary of the Interior, et al., No. C74 1061 WTS. The judgment directs the Bureau of Indian Affairs to conduct among the Indian people of the Hopland Rancheria a referendum at which said Indians shall be presented with the following two choices.

PLEASE READ CAREFULLY BEFORE VOTING

	VOTE FOR ONE
a) Deeds to all real and personal property which the United States conveyed to the trustees of the Hopland Nokomis Association shall be cancelled and title to said property shall be reconveyed to the United States in trust for the Indians of the Hopland Rancheria; or	☐
b) Title to the real and personal property which the United States conveyed to the trustees of the Hopland Nokomis Association shall remain with the Association, subject to the supervision and control by the United States, through the Bureau of Indian Affairs and/or the Indian Health Service as may be appropriate.	☐

ANY DECISION REGARDING THE VALIDITY OF THE BALLOT WILL BE MADE BY THE ELECTION COMMITTEE, AND THAT DECISION WILL BE FINAL.

Appendix I

SUPPLEMENTARY STATEMENT OF THE CASE

(Prepared by Petitioners)

The Hopland Rancheria is a small Indian settlement located in northern California. Prior to 1966, the Hopland Rancheria and the Indians who lived on it were in a "trust" status, subject to the supervision and protection of the United States Department of the Interior, and particularly of the Department's Bureau of Indian Affairs (BIA). Title to the lands of the Rancheria was vested in the United States.

The California Rancheria Act of 1958 (Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, P.L. 88-419, 78 Stat. 390) provided that the trust status of California rancherias such as Hopland could be terminated and their properties distributed, provided certain procedures had been met. In 1961, a termination plan for the Hopland Rancheria was approved and distribution of deeds to the land took place in 1966 and 1967. Under the termination plan, the lands of the Rancheria were largely distributed to individual Indians.

Certain community assets of the Hopland Indians, however, particularly the water system that served the community, were conveyed to a democratic Indian organization, the Petitioner Hopland Nokomis Association. The Association is comprised of the Indians owning land on the Rancheria. Its Board of Directors is elected by them. The Hopland Nokomis Association operated the water system following the 1966 termination of the Rancheria's trust status.

In 1974, California Indian Legal Services filed a complaint on behalf of seven named plaintiffs, Indians with property at the Hopland Rancheria who alleged that they were dissatisfied with the operation of the water system and that the Rancheria had been unlawfully terminated. Jurisdiction was predicated on 28 U.S.C. §§ 1331 and 1361. They named various United States Government officials and the Petitioner Association and its officers as defendants. As the plaintiffs stated in their Ninth Circuit Brief:

> The essence of the legal theory of the complaint was that the Rancheria Act established several mandatory conditions precedent to lawful termination . . . *inter alia,* the provision of water supply and distribution systems, and later, sanitation facilities adequate to meet the reasonable and foreseeable needs of Rancheria residents . . . and that said obligations and conditions precedent had not beeen fulfilled prior to the distribution of the Hopland Rancheria's assets, thus rendering the termination of the Indian status of the people of the Rancheria unlawful and void, and termination of the trust status of the community assets of the Rancheria voidable at the option of the Indians thereof. (C.R. 1).
>
> Specifically, the complaint alleged that the federal government had failed to provide adequate water and sanitation facilities to the Rancheria prior to the distribution of the Rancheria's assets . . . .
>
> Pages 3-4.

The plaintiffs sought to have the water system returned to the United States Government and to have the United States Government operate that system.

The plaintiffs and the United States arrived at an agreement to negate the 1966 termination of the trust status, and specifically to allow the water system to revert back to government control. When the Hopland Nokomis Association, which had shouldered the responsibility for operating the system for more than a decade, declined to agree to have the system go back under federal control, plaintiffs submitted a motion for summary judgment in this case. Excerpt of Record at 66.

The District Court granted the plaintiffs' summary judgment motion after it concluded that there was no genuine material issue of fact concerning the failure of the federal government to meet its obligations to the Hopland Rancheria and its residents. Memorandum of Decision, Appendix E, App. at A-12.

The District Court did not, however, conclude as urged by the plaintiffs that the water system would necessarily have to be returned to the federal government. Rather, the Court stated that the decision on whether or not to return the system to federal control "should be left to the election of the Indian people of the Rancheria" at a referendum. Memorandum of Decision, Appendix E, App. at A-26.

The Court's decision to require a referendum was embodied in its Judgment filed August 3, 1978, Appendix E at A-29-A-30. The parties before this Court are certain Indian plaintiffs who want the property to be in United States ownership; the Department of the Interior and its officers, who also want United States ownership; and the

Petitioners Hopland Nokomis Association and its officers who want to retain ownership in the Hopland Nokomis Association, an Indian organization.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-958

HOPLAND NOKOMIS ASSOCIATION, et al.,

Petitioners,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,

and

CYNTHIA DANIELS, et al.,

Respondents.

INDIAN RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents Cynthia Daniels, Kate Daniels, Mitchell Jack, Frances Jack, Alice Elliott and Walter Arnold (hereinafter "Indian respondents") disagree with petitioners' characterization of the question presented by the Petition herein. Contrary to the Petition, this case does not present any constitutional, statutory or other legal question for review by this Court.

Based upon the record before the district court and the Court of Appeals, the only question presented by this case is this:

> Did the United States Court of Appeals for the Ninth Circuit err in sustaining the district court's order granting the motion of the Secretary of the Interior for entry of judgment vesting title to the "community" assets of the Hopland Rancheria in the United States of America in trust for the Indians of the Rancheria, and denying the Hopland Nokomis Association's motions to grant a longer continuance, reopen the district court's unappealed final judgment of August 3, 1978 and exclude plaintiffs' counsel from further participation in the case?

STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is incomplete to the point of distortion. Indian respondents set forth a complete and accurate statement of the history of this case, so that the context and basis of the district court's orders which were affirmed by the Court of Appeals will be more readily apparent.

By this action, commenced on May 20, 1974, six Indians of the Hopland Rancheria (plaintiffs below and Indian respondents herein) sought to establish that their status as Indians and the trust status of the community assets of the Hopland Rancheria had not been lawfully terminated pursuant to the California Rancheria Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, 78 Stat. 390 ("Rancheria Act"); that a trust relationship still exists between the Rancheria and the United States; that the Indians of the Rancheria are entitled to restore their community assets (which had been conveyed to the trustees of the Hopland Nokomis Association -- defendants below and petitioners herein -- under the Rancheria's distribution plan) to federal trust status; and that the Indian people of the Rancheria are entitled

to protection from the arbitrary, unreasonable and unlawful manner in which the trustees of the Association had managed the Rancheria's water system and other community assets since said assets were distributed.

The essence of plaintiffs' legal theory was that under the Rancheria Act, the United States was to fulfill several mandatory obligations as conditions precedent to the lawful termination of the trust status of the assets and the Indian status of the people of the Rancheria "pursuant to," "in accordance with," "authorized by" and/or "under the provisions of" the Rancheria Act. These obligations included the provision of water supply and distribution systems and sanitation facilities adequate to meet the reasonable and foreseeable needs of Rancheria residents; safeguarding the interests of minors and incompetents; and providing educational and vocational training programs and other benefits sufficient to enable the Indians of a Rancheria choosing to terminate their trust relationship with the United States to assimilate more easily into the surrounding non-Indian community.

Plaintiffs alleged that these conditions precedent had not been fulfilled at the Hopland Rancheria either before or after

distribution of the Rancheria's assets, and thus that neither the trust status of the community assets nor the Indian status of the people of the Rancheria ever had been lawfully terminated.

Plaintiffs' complaint also alleged that the trustees of the Hopland Nokomis Association acting either as agents of the United States or otherwise, unlawfully, arbitrarily and capriciously had managed the Rancheria's community assets -- including the Rancheria water system -- to the severe detriment of the Indians of the Rancheria, and in derogation of their federally-protected rights.

Early in the case, plaintiffs established by uncontroverted affidavits that serious improprieties existed in the conduct of the Association's affairs (C.R. 12, Excerpt of Record [E.R.] pp. 12-49), and that severe harm to Rancheria Indians had resulted from Association mismanagement of the community water system. Based upon this evidence, the district court issued a preliminary injunction preventing the Association from arbitrarily denying water service to people dependent upon the Rancheria's water system, however inadequate that system might be. (C.R. 13, Ex. R., p. 50-51).

Although the Association later denied any improprieties either in its internal operations or its management of the water system, there was no serious dispute by any party as to the fact that the Rancheria's water system was grossly inadequate prior to and at the time the United States distributed the community assets of the Rancheria to the Association's trustees and the other Rancheria assets to individual distributees.

Plaintiffs and federal defendants eventually entered into a lengthy Agreed Statement of Facts, supported by 146 exhibits, which set forth the history of the Rancheria, its water supply problems and the failure of the United States to have adequately ameliorated those problems prior or subsequent to distribution of the Rancheria's assets. Federal defendants also submitted a legal memorandum agreeing that the termination of the Rancheria had been unlawful because the conveyance of Rancheria assets had not been preceded by the provision of adequate water and sanitation facilities to the distributees. (C.R. 63, Agreed Statement of Facts; C.R. 64, Federal Defendants' Preliminary Memorandum). The Association's trustees not only refused to permit their counsel

join in the Agreed Statement, or identify those portions of the Agreed Statement with which the Association disagreed, but also discharged the second set of attorneys to have represented the Association, and undertook to represent themselves for the balance of the district court litigation.

Being unable to obtain the consent of the Association to submission of the case on an Agreed Statement of Facts, plaintiffs moved for summary judgment (C.R. 70). After the Association failed to establish either that there was any genuine issue of material fact, or that plaintiffs were not entitled to judgment as a matter of law, plaintiffs' motion was granted (C.R. 89).

The parties were unable to agree upon the manner in which the court's order granting summary judgment was to be implemented. In order to resolve these differences, plaintiffs requested that the court hold a status conference. (C.R. 80). All parties -- including the Association -- submitted statements of their respective positions on these issues (C.R. 82, 83, 84), and on June 9, 1978, with all parties present and/or represented, the status conference was held. The court issued its status conference order and final judgment on

August 3, 1978. This judgment was entered by the clerk on August 4, 1978. No appeal was taken from this judgment, nor was any motion made under F.R.C.P. Rule 59.

Under the August 3, 1978 judgment, the Indian people of the Hopland Rancheria had the right to choose whether title to the real and personal property conveyed by the United States to the trustees of the Association should be reconveyed to the United States in trust for the Indians of the Hopland Rancheria, or should remain in the trustees of the Hopland Nokomis Association, subject to supervision and control by the United States.* The choice was to be made in a referendum conducted by the B.I.A.. The judgment also established

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*The court's statement of the latter option inadvertantly omitted several words. Through a typographical error, the court's judgment omitted the words, "shall remain with the Association," from the second option. However, the choices subsequently presented to the voters at the referendum accurately reflected both the court's intent and the parties' understanding of the intent, in that the inadvertantly omitted language was included on the ballot. The court subsequently found that the error had neither confused nor prejudiced anyone, and corrected its judgment nunc pro tunc.

the eligibility criteria for participation in the referendum.

In addition to granting relief against the federal defendants, the judgment also permanently enjoined the Association and its trustees from interfering with or refusing to provide water service to the people of the Rancheria except under fair, reasonable and uniform criteria, circumstances and conditions. The Association's trustees also were ordered to file with the court quarterly reports of the Association's revenues, expenses and condition. No such report ever has been filed. [Ex. R. pp. 248-253].

Pursuant to the August 3, 1978 judgment, the B.I.A. notified the Indians of the Rancheria that the referendum would be held, and developed and distributed a tentative list of voters eligible to participate in the referendum. The notice accompanying the list afforded all persons an opportunity to protest the inclusion or omission of persons tentatively listed as eligible voters. Two trustees of the Association, apparently acting on their own, presented the B.I.A. with a list of names of persons whose eligibility was challenged; virtually all of those challenges were based upon grounds other than those specified

in the district court s final judgment.

After receiving and evaluating protests and appeals according to the criteria established in the judgment, the B.I.A. prepared, published and disseminated a final list of eligible voters. (Affidavit of Norman Sahmaunt, Ex. R. pp. 151-186; Affidavit of Charles Scott, C.R. 97, Ex. R., pp. 133-150.)

Thereafter, the B.I.A. published and disseminated notice of the date, time and place of the referendum. There has been no claim by petitioners that the people of the Rancheria did not receive adequate notice of the date, time and place of the referendum, or that either the date, time or place was inappropriate.

On the date (April 22, 1978) and the time and place specified in the referendum notice, the people of the Rancheria gathered, and an official of the B.I.A. explained the procedure of the referendum and the language and substance of the two ballot choices. The B.I.A. official responded to all questions asked by the people in attendance.

The Association was invited to select a representative to sit on an election board which was to consider challenges to the identities of prospective voters; the

Association declined the invitation.

The referendum was held, and the people of the Rancheria voted 52-5 in favor of returning the Rancheria's community assets to federal trust status. [Sahmaunt and Scott affidavits, supra].

The referendum results were certified by the B.I.A./Plaintiffs and federal defendants then made several unsuccessful attempts to persuade the Association's trustees to execute conveyances returning the Rancheria's community assets to federal trust status. Only after those unsuccessful efforts did federal defendants seek to enforce the referendum results by moving for entry of judgment vesting title, pursuant to F.R.C.P. Rule 70. The hearing on federal defendants' motion was set on shorter notice than the 21 days usually required under the local rules of the Northern District of California, because of concerns about severe water problems on the Rancheria.

Counsel for the Association had been informed in early July of the government's intention to move for post-judgment relief (Affidavit of Charles Scott, Ex. R. p. 135); nonetheless, the Association responded to the government's motion by requesting that the hearing thereon be continued, that

plaintiffs' attorneys be disqualified from further participation in the case and that the district court's judgment of August 3, 1978 be reopened. The district court granted the Association a two-day continuance in which to submit a further response to the motion.

After the continuance, the hearing was held. Based upon the evidentiary submissions and legal arguments of the parties, the court granted the government's motion for entry of judgment vesting title and denied the Association's motions to exclude plaintiffs' counsel from further participation and to reopen the court's judgment of August 3, 1978. (C.R. 106, 107).

From the judgment and those orders, the Association appealed to the Court of Appeals for the Ninth Circuit. After an expedited hearing (at the Association's request), the Court of Appeals affirmed the decision of the district court in all respects. The Court of Appeals held that the Association had failed to timely move to reopen the August 3, 1978 judgment; that the district court had not abused its discretion under F.R.C.P. Rule 60(b) in declining to reopen the judgment to reconsider the form of the referendum ballot; that the

district court's finding that there was no evidence of impropriety in the conduct of the referendum was not clearly erroneous; and that the district court had not abused its discretion in granting the Association a continuance of two days, instead of the two weeks which the Association had requested.

It is to review this judgment of the Court of Appeals that a writ of certiorari has been sought.

REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT FOUND AS A MATTER OF FACT, AND THE COURT OF APPEALS CONCURRED, THAT THE FORM OF THE BALLOT BY WHICH THE INDIANS OF THE RANCHERIA VOTED 52-5 TO RETURN THEIR COMMUNITY ASSETS TO FEDERAL TRUST STATUS WAS CONSISTENT WITH THE INTENT OF THE UNAPPEALED FINAL JUDGMENT OF THE DISTRICT COURT, AND NEITHER CONFUSED NOR MISLED REFERENDUM PARTICIPANTS.

The first reason offered by the Association for granting the writ is that there is an unsettled question as to whether its property lawfully could be conveyed to the United States as a result of an election "based on a confusing and misleading ballot." No such "unsettled question" exists, because the district court found, and the Court of Appeals concurred, that as a matter of fact the language of the ballot used in the referendum was absolutely consistent with the intent of the district court's unappealed final judgment directing that the referendum be held, and that there was no significant evidence that either the language of the ballot or the manner in which the B.I.A. conducted the referendum in any way confused, misled or intimidated the voters. Neither the district court nor the Court of Appeals found any basis for reopening the unappealed

final judgment, granting a further continuance or excluding plaintiffs' counsel from further participation in the case.

The Petition's rhetoric about "due process" is a smokescreen; the question which the Petition actually presents is whether the district court and the Court of Appeals correctly evaluated the facts presented by the parties in the proceedings on the motion for entry of judgment vesting title.

It is a well-established rule of practice that except in cases of obvious and egregious error, the Supreme Court will not grant a petition for writ of certiorari to review factual findings of the district court in which the Court of Appeals has concurred. Guzman v. Pichirilo, 369 U.S. 698 (1962); Blau v. Lehman, 368 U.S. 403 (1962). Nothing in the record in this case suggests any factual error whatsoever.

The wording of the options on the ballot at the referendum was ordered by the district court's final judgment. If the Association had noticed the typographical error, or had believed that the court's choice of words rendered the options too complicated, confusing or misleading, the Association could and should have raised

these matters with the court by moving immediately under F.R.C.P. Rule 50 to amend the judgment, or somewhat later under F.R.C.P. Rule 60 for relief from the judgment. The Association did not do so.

The Association could have appealed from the district court's August 3, 1978 judgment. It did not do so.

The Association could have filed an administrative appeal with the Secretary of the Interior protesting the referendum results, or it could have come immediately to the court, before the referendum results had been certified, and complained about the referendum procedures or the ballot language. It did neither.

The evidence before the district court showed that the Association knew perfectly well what the court intended to be included on the referendum ballot even before entry of the original final judgment, and that the ballot language was exactly what the court intended it should have been. The evidence also showed that instead of trying to cure any alleged defect or confusion in the substance or procedure of the referendum, the Association chose to do nothing about it until <u>after</u> the referendum was held and the people had voted 52-5 against the

Association trustees' continued retention of title to the Rancheria's community assets.

In summary, there simply is no credible evidence in the record to support petitioners' conclusions, speculation and assumptions about the existence or source of confusion of some other taint of the referendum process. Rather, the evidence before the district court provided an ample basis for the district court's conclusion, and the Court of Appeals' concurrence, that the people of the Rancheria freely and knowingly chose to return their community assets to federal ownership, rather than continuing to be subjected to the arbitrary and capricious whims of the Association's trustees.

Petitioners' fanciful and unsupported speculations and assumptions about the Indian community's level of awareness about the issues involved in the referendum, the elitist linguistic tendencies of bench and bar, and the purported significance of the district court's nunc pro tunc correction of a typographical error in the August 3, 1978 judgment cannot detract from the following evidence in the record:

1) the ballot was worded exactly as the district court had intended, and as the parties had understood

it would be;

2) the Indian people of the Rancheria community received ample official and unofficial notice of the purpose, date, place and time of the referendum (indeed, petitioners never have claimed that insufficient notice about the referendum was given; if anything, petitioners seem to complain that too much information was disseminated about the purpose of the referendum);

3) the B.I.A. gave ample notice of the persons entitled to vote, and provided ample time for challenges of eligibility, within the limits set by the district court's judgment;

4) at the place of the referendum, the B.I.A. explained and answered questions about the choices on the ballot, but did not allow either side to harangue the electorate at the polling place;

5) because the "challenges" to voters which petitioners wanted to make on the day of the referendum were based upon petitioners'

disagreement with the eligibility criteria established by the district court in its unappealed final judgment of August 3, 1978, rather than upon any claim that persons presenting themselves to vote were not the persons they claimed to be, the B.I.A. could not have sustained such challenges even if petitioners had been permitted to make them;

6) every person desiring to vote had a free and unobstructed opportunity to cast a secret ballot, and everyone in attendance who wished to vote did so;

7) although several unflattering remarks may have been addressed to or made about one or two of the Association's trustees, the referendum was not disrupted by disorder at the polling place;

8) prior to the referendum, no objections were expressed to the language, form or complexity of the ballot by anyone, and none of the participants in the referendum made any such objections at the polling place;

9) the Indian people of the Rancheria voted 52-5 in favor of returning their community assets to federal trust status; and

10) the Association did absolutely nothing to express its alleged dissatisfaction with the proposed or actual wording of the options presented at the referendum, or with the results of the referendum, until three months after the referendum, and then only in response to the motion by the United States for entry of judgment vesting title to the community assets of the Rancheria in the United States for the benefit of the Indians of the Hopland Rancheria.

Based upon this evidentiary record, the Court of Appeals was amply justified in sustaining the judgment and orders of the district court.

II. THE ASSOCIATION DID NOT CLAIM ANY VIOLATION OF THE FIRST OR FOURTEENTH AMENDMENTS IN EITHER THE DISTRICT COURT OR THE COURT OF APPEALS, AND THUS CANNOT RAISE SUCH A CLAIM FOR THE FIRST TIME IN THE PETITION FOR A WRIT CERTIORARI.

As a second purported reason for granting the writ, petitioners assert -- for the first time -- that the referendum ballot and procedure violated the voters' right under the First and Fourteenth Amendments to be protected from alleged confusion and deception. At no time prior to the filing of the Petition for Writ of Certiorari did the Association assert the violation of any constitutional right other than the Due Process Clause, and no "state action" has been alleged.

It is too well established to warrant extensive briefing that in all but the most compelling and significant circumstances, the Supreme Court will not reach on certiorari an issue or argument which was not also made in the district court and/or the Court of Appeals, U.S. v. Ortiz, 422 U.S. 891 (1975); Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963).

The Association has neither shown nor attempted to show that the circumstances of this case are either so significant or so

compelling as to warrant a departure from this salutary rule. For this reason also the Petition should be denied.

No. 80-958

In the Supreme Court of the United States

OCTOBER TERM, 1980

HOPLAND NOKOMIS ASSOCIATION, ET AL., PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the district court properly exercised its discretion in denying petitioners' motion to reopen a judgment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3) and the judgment orders of the district court (*id.* at A-4 to A-11) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1980. The petition for a writ of certiorari was filed on December 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1961, the Secretary of the Interior purported to terminate the Hopland Indian Rancheria, a tribal reservation, in accordance with the California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619, as amended by Pub. L. No. 88-419, 78 Stat. 390. Pursuant to the termination plan, the United States conveyed certain property previously held in trust for the common benefit of the Rancheria members to petitioner Hopland Nokomis Association. In 1974, however, a number of Hopland Indians ("the respondents") filed this suit in the United States District Court for the Northern District of California, claiming that the termination plan had failed to provide for a water system, as required by Section 3(c) of the Act. They sought a declaration that the Rancheria had not been terminated and that the United States still owed a trust obligation to the Rancheria. In addition, respondents requested that the court cancel the deed held by the Association to the commonly held property (Pet. App. A-1 to A-2, A-14 to A-17, A-23 to A-27).

Counsel for all parties, including petitioners, initially agreed that the action should be submitted to the court on a stipulated statement of facts. Respondents and the Secretary subsequently filed an agreed statement of facts, which petitioners refused to join. Thereafter, based on the stipulation and petitioners' failure to demonstrate the existence of

any disputed material issue of fact, the district court granted respondents' motion for summary judgment and declared the termination of the Hopland Rancheria invalid. Rather than return the communal property to the United States, however, the district court directed the Secretary to conduct a referendum in which the Hopland Indians could choose between continued ownership of the property by the Association or reconveyance to the United States as trustee (Pet. App. A-1 to A-2, A-25 to A-27). In August 1978, following consultation with all of the parties, the court issued a judgment order setting forth the ballot language and the conditions for voter eligibility (*id.* at A-29 to A-31). Petitioners did not object to the ballot language and did not appeal from this final order.

The referendum was held on April 22, 1979, and the Indians voted 52 to 5 to reconvey the communal property to the United States as trustee. Petitioners did not raise any objection to the ballot itself, the tabulation, or any other aspect of the referendum, and again did not attempt to appeal the original judgment. Petitioners nonetheless refused to convey title to the United States. Accordingly, on July 25, 1979, the Secretary filed a motion for entry of an order conveying title to the disputed lands to the United States. See Fed. R. Civ. P. 70. Petitioners opposed the motion and moved to reopen the judgment on the ground that the election had been improperly conducted. Based on its examination of the various affidavits submitted by the parties and the election results and records, the district court denied petitioners' motion to reopen the judgment and entered a judgment vesting title in the United States as trustee (Pet. App. A-4 to A-11).

The court of appeals summarily affirmed (Pet. App. A-1 to A-3). The court considered petitioners' collateral attack on the referendum as a motion to reopen the judgment under Fed. R. Civ. P. 60(b). Concluding that the election

had been properly held, the court determined that the district court did not abuse its broad discretion in declining to reopen the judgment (Pet. App. A-2 to A-3). Accordingly, the court of appeals affirmed the judgment order of the district court vesting title to the communal property in the United States.

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with any decision of this Court or of any court of appeals. Moreover, the decision below lacks general significance and is tied to the unique facts and proceedings in this case. Hence, further review by this Court is unwarranted.

1. Petitioners seek to challenge (Pet. 4-13) the referendum among the Hopland Indians in which that tribe voted overwhelmingly to reconvey their communal lands to the United States as trustee. But petitioners failed to attack either the ballot or the election itself in a timely fashion. Thus, as the court of appeals concluded (Pet. App. A-2 to A-3), the sole issue on this appeal is whether the district court abused its discretion under Rule 60(b) of the Federal Rules of Civil Procedure in declining to reopen the judgment underlying that election. See *Browder* v. *Director, Ill. Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978); *EEOC* v. *Safeway Stores, Inc.*, 611 F. 2d 795, 799 (10th Cir. 1979), cert. denied, No. 79-1393 (May 19, 1980); *Fuhrman* v. *Livaditis*, 611 F. 2d 203, 204 (7th Cir. 1979). No abuse of discretion occurred here.

The ballot language that petitioners now claim is confusing was initially set forth in an order of the district court dated August 3, 1978. Petitioners, who were parties to the litigation and who were consulted about the wording of the August 3 order, fail to explain why they did not challenge that order on direct appeal, but rather waited almost a year

before raising their claims as a defense to the government's motion to convey title. Likewise, petitioners offer no explanation for their failure to seek immediate review of the election results and proceedings. In the absence of newly discovered evidence or other compelling circumstances, the courts below correctly declined to entertain petitioners' belated collateral attack on the referendum and underlying August 3 judgment. See, *e.g.*, *Jafree* v. *Scott*, 590 F. 2d 209, 211-212 (7th Cir. 1978); *Jennings* v. *Hicklin*, 587 F. 2d 946, 947-948 (8th Cir. 1978); *United States* v. *Russell*, 578 F. 2d 806, 807 (9th Cir. 1978); *Boughner* v. *Secretary of HEW*, 572 F. 2d 976, 978 (3d Cir. 1978).[1]

2. In any event, petitioners' claims concerning the referendum are insubstantial. Notwithstanding petitioners' belated suggestions concerning the misleading nature of the ballot, that ballot plainly informed the voters of their choice to "reconve[y the communal property] to the United States in trust for the Indians of the Hopland Rancheria" or to permit "[t]itle to the * * * property * * * [to] remain with the Association" (Pet. 5). Moreover, contrary to petitioners' claim (Pet. 8), the Indian voters had advance notice of the election issue and the ballot. On December 11, 1978, four months before the election, the Bureau of Indian Affairs sent all eligible voters a notice of the referendum paraphrasing the two options set forth in the judgment. In addition, copies of this notice were posted in various places within the Rancheria. See Affidavit of Norman L. Sahmount, Bureau of Indian Affairs, excerpt of record, at 152-154, 176-177.

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[1]The court of appeals also correctly observed (Pet. App. A-3) that petitioners failed to seek administrative review of the election results and thus may not be heard to complain.

Petitioners also suggest (Pet. 9-13) that there is substantial evidence demonstrating the voters' actual confusion about the referendum. But the sole statement supporting this claim is the affidavit of only one of the approximately 60 eligible Indian voters (see Pet. 9). The other statements and events cited by petitioners are irrelevant. For example, Angelo Knight's letter concerned the status of noncommunal Indian lands that were not the subject of the referendum, and John R. Worlund was not an eligible voter (see Pet. 11-12). Similarly, petitioners do not explain how the apparent hostility of some of the voters to petitioners demonstrates the voters' confusion. Particularly in light of the overwhelming vote (52 to 5) in favor of reconveying the lands to the United States as trustee, the courts below correctly concluded that there is no evidence that the election was improperly conducted or that the voters were confused (Pet. App. A-3, A-7 to A-8, A-10 to A-11). Further review of this narrow factual question is unwarranted. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[2]

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[2]Petitioners' novel constitutional claim (Pet. 13-14) that an unintentionally confusing ballot automatically violates the due process rights of Indian voters is not supported by any of the authorities cited by petitioners. See also *Mobile* v. *Bolden*, 446 U.S. 55 (1980). We further note that this claim is not properly presented here, since petitioners failed to raise this claim on direct appeal and since petitioners have failed to demonstrate that the voters were in fact confused.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1981

IN THE

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OCTOBER TERM, 1981

NO. 80-958

HOPLAND NOKOMIS ASSOCIATION, et al.,

Petitioners,

vs.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,

Respondents,

and

CYNTHIA DANIELS, et al.,

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to the
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PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

The Federal defendants and the plaintiffs below raise four issues in their Oppositions to the Petition for Writ of Certiorari which merit reply.

1. Petitioners' Attack on the Confusing and Misleading Wording of the Ballot is Not a Collateral Attack on the 1978 Final Judgment That Required a Referendum to Be Held, Because the 1978 Judgment Did Not Specify the Wording of the Ballot.

Federal respondents assert: "In August 1978 . . . the court issued a judgment order setting forth the ballot language . . . ." Brief for the Federal Respondents in Opposition (hereinafter "Fed.Resp. Brief") at 2. This view of the August 1978 Judgment was shared by the Court of Appeals, which therefore concluded that the Hopland Nokomis Association was engaged in a collateral attack on the original, final Judgment requiring there to be a referendum. The Court of Appeals considered such a collateral attack to be barred, treated the Association's position as raising nothing more than a discretionary request to re-open the 1978 Judgment, and held that the District Court had not abused its discretion in declining to re-open the Judgment. Pet., Appendix A, at A-2.

This view constitutes a misinterpretation of the original Judgment. In fact, the 1978 Judgment required a referendum on the subject matter specified in paragraph 4 of the Judgment, namely, whether the communally-owned property

of the Hopland Rancheria should remain with the Association or should be transferred to the federal government. But the Judgment did not expressly provide that the legalistic wording of the Judgment should be presented to the voters on the referendum ballot. Judgment, Pet., Appendix F, at A-29 to A-30. The Bureau of Indian Affairs subsequently made a decision -- not specifically required by the 1978 Judgment -- to simply use the language of the Judgment as the language of the ballot, notwithstanding the difficulties that the voters would have in understanding such a ballot.

Because it does not object to the Indian Voters of the Hopland Rancheria making a choice, Petitioner Hopland Nokomis Association does not challenge the original Judgment. Petitioner's objection is rather that the voters could not make that choice in a meaningful way, because the wording of the ballot tended to lead the average voter to select the choice opposite to the one that he or she would intend. No such ballot language was required by the Judgment.

2. The Mixed Factual and Legal Character of the Issue Presented Does Not Preclude Effective Review in This Forum, Because This Court Has the Power to Examine the Facts Where Constitutional Interests are at Stake, Particularly Where the Central Factual Issue Concerns the Reading to Be Given a Written Ballot Equally Accessible to This Court.

The plaintiffs below assert in their brief opposing the Petition that both the District Court and the Court of Appeals found as a matter of fact that "there was no significant evidence that . . . the language of the ballot . . . in any way confused, misled or intimidated the voters." Indian Respondents' Opposition to Petition for Writ of Certiorari (hereinafter "Plaintiffs' Brief") at 13.

The District Court did find that the voters were not confused by the ballot. Order Granting Motion to Convey Title, etc., Pet., Appendix D, at A-10, A-11. This finding does not preclude effective appellate review for two reasons. First, given the fundamental importance of an effective franchise, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 562 (1964). Second, less deference may be given the trial court's finding when it largely involves the assessment of a writing, such as the ballot here, which is equally accessible to the appellate court. In another context, involving libel, this Court stated:

> [W]e must . . . in proper cases review the evidence to make certain that those [constitutional] principles have been constitutionally applied. . . . [W]e "examine

> for ourselves the statements in issue and the circumstances under which they were made . . . ."
>
> New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

The Hopland Nokomis Association has proposed the following constitutional standard for instances in which property is to be taken away as a result of a referendum: Was the ballot so confusing and misleading that voters who sought one outcome might be led to vote for the opposite outcome? Pet. at 12-13.

If such a test were to be applied, it is obvious that the most important single piece of factual evidence would be the ballot itself. The ballot actually presented to the Indian voters of the Hopland Rancheria, Official Ballot, Pet., Appendix H, at A-35 to A-36, is part of the record. This Court is perfectly capable of reading that ballot and determining its inherently confusing character. The factual finding of the District Court is therefore no impediment to the Court considering the important mixed questions of fact and law presented in the Petition.1/

1/ Although the Federal Respondents assert, in a general fashion, that "the Indian voters had advance notice of the

(continued on next page)

3. Petitioners' Election to Present their Claims as a Defense to the Federal Defendants' Rule 70 Motion to Vest Title Did Not Constitute a Waiver of Those Constitutional Claims, and Was Not So Considered By Either Court Below.

The plaintiffs and the federal respondents have asserted that the Association did not attack the ballot in a timely fashion or avail itself of purported administrative remedies. Fed. Resp. Brief at 3,4; Plaintiffs' Brief at 15.

(Continued from p. 6) election and the ballot," Fed. Resp. Brief at 4, they do not and cannot claim that the actual wording of the ballot was seen by any voter before walking into the polling place. Their more precise claim, consistent with the factual picture drawn by the Petition, is only that "four months before the election, the Bureau of Indian Affairs sent all eligible voters a notice of the referendum paraphrasing the two options set forth in the judgment." Id. (emphasis added). Thus, even if the voters thereby understood the subject matter of the referendum, they had no advance notice of the central problem they faced on election day: which way to vote to get their desired choice.

Although the Court of Appeals noted in passing that no administrative review had been sought, Pet., App. A, at A-3, neither the District Court nor the Court of Appeals held that the Association's due process claims were waived by any failure to seek administrative review.2/

Of course, the Petitioners had no opportunity to protest the wording of the referendum in advance because they, like the other Indian voters, had no notice of the actual wording of the ballot prior to the day of the referendum. After the referendum took place, the Association elected to contest the validity of the referendum by declining to execute deeds conveying its property to the federal government. The Association thereby forced the government to move to vest title pursuant to Rule 70, F.R.Civ.P.; and the Association presented its objections to the ballot and the referendum as defenses to the Rule 70 motion.

2/ Federal Respondents assert: "The court of appeals also correctly observed (Pet. App.A-3) that petitioners failed to seek administrative review of the election results and thus may not be heard to complain." Fed. Resp. Brief at 4, n. 1 (emphasis added). The Court of Appeals did not draw the conclusion that respondents assert. See Pet., Appendix A, at A-3.

No statute, administrative code section or case has been cited by either respondent, indicating that petitioners' election to present its constitutional claim as a defense constitutes a waiver. The 1978 Judgment made no provision concerning review of complaints about the wording of the ballot. And both the District Court and the Court of Appeals considered the Association's due process claim, notwithstanding any supposed waiver. This Court is free to reach Petitioner's constitutional claims if it deems them worthy of consideration.

4. The First Amendment Issues are Properly Before This Court.

The plaintiffs claim that voters' rights under the First and Fourteenth Amendments cannot be raised on certiorari because they were not raised below. We do not, of course, raise any Fourteenth Amendment claims in this Court. It is action by federal officers of which we complain.

Petitioners' first reason for granting the writ -- namely, that the Association was deprived of its property without due process of law when the District Court ordered a conveyance pursuant to a confusing and misleading ballot -- was raised in both courts below, and ruled upon by them. Pet., Appendix A, at A-2; Appendix D, at A-10 to A-11.

The First Amendment cases are instructive to the issue of whether Petitioners were denied due process of law. And the denial of due process here has implications throughout the federal government with respect to the standards for conducting elections. The issue is the same one that was fully presented below -- did these voters lose their property on the basis of an unfair election? The First Amendment issue, to the extent that it is considered separate from the voting due process issue, is certainly ancillary to the major issue and may be considered by the Court. Sup. Ct. R. 21.1(a); see, Procunier v. Navarette, 434 U.S. 555, 559, n. 6 (1978).

Conclusion

For hundreds of years, American Indians have been stripped of their land by the federal government, often through the use of legalisms not understood by the Indians. Although Petitioners do not claim that the confusing legalisms of the ballot were part of a deliberate scheme to misled the voters of the Hopland Rancheria, the effect was the same. A legal mechanism which was in this case expressly intended to allow the Indians to make a free choice was converted into its opposite.

The Court should grant the writ so that the Indian voters are given an opportunity to make a true choice, and so that minimum standards for such exercises of the franchise may be drawn.

Respectfully submitted,

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